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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 634

LINUS PAULING,
Petitioner,

v.

NEWS SYNDICATE CO., INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

JAMES W. RODGERS,
Counsel for Respondent,
220 East 42nd Street
New York, N. Y. 10017

ANDREW L. HUGHES,
ANSON M. KELLER,
Of Counsel.

November 25, 1964

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STATEMENT

This action for libel was tried for four days in the Southern District of New York before Judge Dawson and a jury (1a*). The jury brought in a verdict for respondent. Petitioner appealed. The Court of Appeals, Second Circuit, unanimously affirmed. The Court's opinion of 20 pages, written by Judge Friendly, discussed the contentions made by petitioner and rejected them (P. 23-43). Petitioner ap-

*Hereinafter, references to the appendices and transcript will be made as in the Petition. References to pages of the Petition will be, *e.g.*, "P. 1".

plied for a rehearing and that was denied. This case has received more consideration than it deserves. It is a typical libel suit, presenting no problems which require this Court's review, and one in which the parties were accorded a full measure of justice.

The "Questions Presented" by the Petition are out of perspective and are so phrased as to suggest an importance to this case that does not exist. Most of the argument contained in the Petition is related to a statute (§ 74 of the New York Civil Rights Law, formerly § 337 of the Civil Practice Act) that is irrelevant and injected into this case now for the first time. No defense founded on this statute, which deals with fair and true reports of judicial, legislative or official proceedings, was interposed by respondent and no contention related to this statute has heretofore been raised. The defense in this case rested upon the pleas (i) that the editorial was not defamatory; (ii) that the editorial was fair comment; (iii) that petitioner's public activities had created for him a reputation that could not have suffered damage by reason of the editorial; and (iv) that respondent relied upon trustworthy sources, including prior publications of legislative investigative committees of the United States and the State of California and news media (6b-8b). This defense "(iv)" was pleaded pursuant to § 338 of the New York Civil Practice Act (now § 78 of the Civil Rights Law). By that section a defendant, in an action for libel, is permitted to prove the sources of his information and the grounds for his belief, even though the evidence used to make such proof be hearsay in character.

Although the complaint in this action pleaded no innuendo, it was the petitioner's persistent contention below that by its publication respondent meant and intended to mean that petitioner was a Communist, sympathetic to Communism, and a traitor. On the other hand, respondent's

position was that it made no such charge but was commenting critically upon petitioner's advocacy of our Government's unilateral cessation of nuclear testing—comment warranted by the facts stated in the editorial and the widely publicized positions of the petitioner in his attention-getting efforts to publicize his views of the Government's policies concerning nuclear testing in particular and Communists in general.

On respondent's concept of what the editorial was conveying to the public, it would probably have been sufficient for it to have proved, as it did, that petitioner had taken a stand for unilateral cessation of nuclear testing. Petitioner insisted that while, "in general," he had not advocated unilateral cessation of nuclear testing:

> "There have, I believe, been some periods when I felt that, and stated that we could without any decrease in our safety refrain from testing for a certain period of time, even though the Soviet Union might be continuing . . ." (47b; see also 28b).

These occasions, petitioner said, were attempts "to influence government policy to stop testing during a period when Soviet Russia was testing" (48b).

Then, through petitioner, respondent showed his sponsorship of a petition by scientists to the United Nations to stop the testing by nuclear bombs in 1958, although the petition makes no mention of inspection or a reciprocal agreement with the Soviet Union (121b); his futile action in 1958 in the Federal Court for the District of Columbia to enjoin the United States from testing, regardless of what other nations were doing and his similar futile attempts in Great Britain and the Soviet Union (*Pauling* v. *McElroy*, 278 F. 2d 252 (D. C. Cir.), *cert. den.* 364 U. S. 835 (1960) (60b-67b)); his discussion with the ambassa-

dors of the United States, Great Britain and the Soviet Union then negotiating a test ban treaty in Geneva and his statements thereafter that the Eisenhower Administration was not putting forth its best efforts to obtain a test ban agreement, making no similar charge, however, with respect Khrushchev's Administration in the Soviet Union (49b-59b); and his picketing of the White House (when President Kennedy and Prime Minister MacMillan were conferring) with a sign stating that the United States had no right to test, although, as plaintiff knew, the Soviet Union was then testing nuclear weapons (25b-29b).

On August 31, 1961, three days prior to the publication of the editorial, the Soviet Union announced resumption of nuclear weapons testing that had not taken place since 1958 (41b, 42b). Upon hearing the announcement, petitioner prepared a statement of protest for public dissemination by the press services, various newspapers and Radio Liberty Free Europe (75b, 76b, 93b, T. 265-266). This statement (Pl. Ex. 14) was read into the record by petitioner, together with the covering letter to Premier Khrushchev, asking him to reconsider. Petitioner also wrote to President Kennedy and included in that letter a paragraph not found in either the press statement or the letter to Premier Khrushchev (94b, 95b). That paragraph read:

> "Now I write to suggest that the United States might be able to refrain from resuming the testing of nuclear weapons, even though the Soviet Government might resume this testing, and that by refraining the United States might not be significantly damaged in a military way and would benefit immensely through the impact of our moral position." (94b-95b) (Pl. Ex. 13)

On the basis of this evidence alone with respect to the facts contained in the editorial complained of, any com-

ment therein would appear to be warranted and privileged as fair comment.

Faced, however, with petitioner's contention of the gravity of the charge contained in the editorial, petitioner was examined in regard to a variety of his activities. He testified that he had picketed the House Un-American Activities Committee hearings in San Francisco (32c-35c); that he had consistently taken positions in Communist conspiracy cases that opposed and criticized the federal courts at all levels (59c-60c, 62c, 68c); that he had criticized Dr. Edward Teller and Dr. Willard F. Libby as making statements "not honest . . . or forthright" (39b-40b); that he has publicly advocated the admission of Red China into the United Nations (T. 152); that certain United States Senators, including Senator Keating, were "the greatest enem[ies] the United States has" (T. 242-43), and that he had taken public positions and filed briefs in this Court for reversal of the Subversive Control Board's determination that the Communist Party should register as an agent of a foreign government (17c-19c). Other testimony, along the same lines, is digested in footnote 4 to the Court of Appeals' opinion (P. 29).

Petitioner's claim of error based on the contention that the trial court permitted a violation of the hearsay rule in admitting answers to some eight or nine questions in the four-day trial, devoted in most part to his own admissions of his controversial postures, brushes aside the overwhelming unobjected-to testimony in support of the reasonableness of respondent's editorial comments.

ARGUMENT

This case involves no question of widespread public importance, presents no issue on which a conflict among circuits exists as to New York law and involves no federal

questions or federal statute. The Court of Appeals, in its thorough and lengthy opinion, discussed and rejected most of the arguments now presented to this Court by petitioner. The Courts below correctly applied the state law. Moreover, the petition raises issues which do not affect the judgment in this action.

POINT I

THE EVIDENTIARY QUESTIONS RAISED BY PETITIONER WERE CORRECTLY DECIDED BY THE COURT BELOW AND DO NOT WARRANT REVIEW.

In Point I and Point II of the Petition, petitioner asks this Court to review a few evidentiary rulings made by the trial court and affirmed on several grounds by the Court of Appeals. These rulings affected only eight or nine questions related either to a Senate Internal Security Subcommittee Report concerning petitioner or to petitioner's publicized views as to why he thought the Department of State twice refused him a passport (P. 32-P. 34, P. 39-P. 40).

The Privilege of Fair Comment

In Point I, petitioner urges that the Court of Appeals was wrong in holding the evidence admissible because the editorial did not purport to contain any privileged report of official proceedings under § 74 of the Civil Rights Law of New York. This contention not only misconceives the applicable law and what the Court actually held, but is also irrelevant. The misconception apparently arises from petitioner's view that § 74 "establishes the exclusive grounds for the innovation of privilege in a libel case" (P. 10). This is not true. Section 74 deals only with one privilege, —that accorded a fair and true report of a judicial or

official proceeding. That privilege was neither claimed by respondent nor discussed in the Courts below. The privilege claimed by respondent and discussed by the Court of Appeals was the privilege of fair comment and the true, privileged or publicly available facts upon which such privileged comment may be based.

Section 78 of the Civil Rights Law

In Point II, petitioner quarrels with the second basis given by the Court below for permitting the questions concerning the Senate Report and the passport, namely the provisions of § 78 of the Civil Rights Law. Petitioner first argues that the Senate Report was never physically offered into evidence. But respondents' counsel was under no obligation to put the report into evidence. Section 78 permits the defendant to "prove" his sources of information and the grounds for his belief, and of course does not specify the means of proof. As the Court below pointed out, petitioner's trial counsel could very well have asked that the Senate Report be admitted into evidence, saying (P. 36):

> ". . . but plaintiff's trial counsel refrained from pressing that point, wisely, we think, since the report itself would have been immensely more damaging than the few questions asked about it. We have examined the Report to see whether the questions propounded were an unfair paraphrase; we find them to have been almost a literal transcription from two of the Subcommittee's eleven unfavorable conclusions."

A second reason offered by petitioner to avoid the application of § 78 of the Civil Rights Law is that "Nor did the defendant ever connect up this cross-examination with its own reliance on such reports" (P. 13).

The testimony of respondent's editorial writer, Reuben Maury, who has served in that capacity since 1926, showed the error of this statement. Maury testified that his sources of information for the editorial included (i) the clipping file concerning Pauling from defendant's library that contained everything that came along about any subject that it had files on, (ii) upon the Senate Report, the substance of which he knew, and (iii) upon current newspaper reports of the Soviet's announcement of nuclear testing and Pauling's communication to Khrushchev (109b, 113b, 116b-117b).

Maury also testified that he had read of Pauling's "course of action down the years" and "that he usually followed a line of political thinking which was against the interests of the United States in regard to nuclear testing" (102b; 118b). Petitioner called Maury as his witness and had adequate opportunity to examine him in regard to the details of the contents of the clip files upon which he relied and his memory of the newspaper history of Pauling that he had followed down the years.

With respect to the admissibility of Congressional reports in the defense of a libel action, petitioner claims a conflict among circuits. If there be any conflict (and petitioner surely shows none relevant here), it is not one for which this Court will grant certiorari, for the conflict, if any, is the result of a difference in state law, *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 206 (1938). In New York the statute expressly permits a defendant in a libel action to introduce such reports if relied upon. For example, in *Varvaro* v. *American Agriculturist, Inc.*, 222 App. Div. 213, 217-218, 225 N. Y. Supp. 564 (1st Dep't 1927), the court said:

> ". . . they had a right to prove the source of information relied on in publishing the article and the facts contained therein . . .

> "It was competent, therefore, for the defendants to introduce in evidence the statement of the United States Post Office Inspector furnished in the first instance to the Assistant United States District Attorney who prosecuted the case and who in turn furnished it to the defendants before the publication of the alleged libelous article. This statement purports to give a complete summary of the activities of the Standard Food and Fur Association, Inc., as disclosed by the investigation of the Post Office Department. For the same reason, the letter received by the defendants from the Curtis Publishing Company to the effect that the latter organization had refused to received further advertising from the corporation because of numerous complaints received, was admissible. So, too, it was error to exclude the receipt by the defendants of the United States Department of Agriculture bulletin."

Any Hearsay Evidence was Harmless

The 8 or 9 questions dealing with the Senate Report and Passport Office in over 500 pages of transcript is of no significance in view of the overwhelming evidence of which plaintiff does not complain. *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 184 (1944), *reh. den.* 323 U. S. 818 (1945); *Cereste* v. *New York, New Haven & Hartford R. Co.,* 231 F. 2d 50 (2nd Cir.) *cert. den.* 351 U. S. 951 (1956); Rule 61, Federal Rules of Civil Procedure. Moreover, at trial petitioner was permitted by the Court, time and time again, to testify that the Senate Report was false, inaccurate and otherwise faulty (82b, 83b, 84b, 85b, 86b). If there had been any error in its admission, that fact was nullified by petitioner's testimony. In *Brinkley* v. *Fishbein,* 110 F. 2d 62 (5th Cir.), *cert. den.* 311 U. S. 672 (1940), an action for libel, plaintiff appealed from a judgment for

defendant. The publication charged plaintiff with being a medical charlatan. Defendant pleaded fair comment. The Court, in affirming the judgment, stated at 64:

> "The trial resulted in a verdict for defendant, upon which judgment was entered. The entire evidence is brought up in the record which consists of 1,164 printed pages. There are some thirty-two assignments of error. Twenty-four run to the admission or rejection of evidence and the others to parts of the general charge and to special charges given or denied. We are spared the necessity of discussing the assignments of error in detail and of reviewing the evidence. It is sufficient to say that the evidence of plaintiff, who was placed on the stand by defendant, tends to show the truth of the statement of fact complained of and we find no substantial evidence tending to show defendant was actuated by malice or that plaintiff suffered any actual damage compensatable in money."

If there be any error here, and we submit there was none, it was harmless; the rejection of the evidence would not have changed the verdict.

POINT II

THE QUESTIONS RAISED BY PETITIONER AS TO THE TRIAL COURT'S CHARGE AND PETITIONER'S ATTACK UPON THE TRIAL COURT WERE PROPERLY REJECTED BY THE COURT BELOW AND DO NOT WARRANT REVIEW.

The Trial Court's Charge was Fair

The Court of Appeals found nothing wrong with the charge. Petitioner's trial counsel agreed. He declared "We have no exceptions" (21a, 22a) and commended the charge as "lengthy and thorough" (20a) and a "very good job"

(20a). Petitioner, however, urges that the language in the editorial was not susceptible of the interpretation given by the trial court, that the trial court in fact directed a verdict for defendant and that the trial court failed to properly charge upon the issue of the burden of proof.

It is hornbook law that if a publication is susceptible of both a defamatory and non-defamatory meaning, it is for the jury to say whether in fact the editorial is libelous, e.g., *Sweeney* v. *United Feature Syndicate, Inc.*, 129 F. 2d 904, 907 (2nd Cir. 1942). It is reasonable to argue that this publication, an editorial, is not defamatory at all, but would be recognized by readers as merely opinion in relation to a controversial figure on a controversial matter. In any event, submitting the issue of defamation to the jury was the best that petitioner could expect.

Secondly, the argument that the trial court directed a verdict for respondent is entirely unsupported by the Record. The Court below agreed (P. 27).

Thirdly, petitioner argues that the Court erred by failing to charge that the defendant had the burden of proving the defense of fair comment. That contention is not supported by the Record. At the first mention of the defense of fair comment, the Court instructed the jury:

> "You then come to the next question of fact. That question is this: If you find that the editorial was libelous, *has the defendant established* that all the facts therein contained were true, and that the comment therein was fair comment? Whether a fact is true or not, of course, is something you must decide from all the evidence." (Emphasis supplied.) (9a)

It further instructed the jury:

> "In order for a defendant to establish the defense of fair comment on a subject of public interest, four elements must be established:" (9a)

And more specifically, as to the burden of proving truth, the Court charged:

> "If, on the other hand, you find that there is more than an unsubstantial difference between the truth and what appeared in the editorial, as interpreted by you, then you must find that the defendant has failed to prove his defense of truth. If the truth would have had a different effect on the mind of an ordinary reader than the editorial would have had, the defendant has not justified its actions." (12a-13a).

Petitioner has no just complaint about these charges that placed the burden of proof on defendant, not only with respect to the proof of truth, but also with respect to the privilege of fair comment. The applicable New York law on the question is well stated in *Kenna* v. *Daily Mirror, Inc.*, 250 App. Div. 625, 295 N. Y. Supp. 219 (1st Dep't), aff'd. 276 N. Y. 433 (1937), as follows at 629:

> "Here, we had the public occasion, a matter of public interest appearing on the face of the complaints, and consequently, the law of fair comment applied without the necessity of pleading the special privilege. Since that is so, the burden rested upon the plaintiffs to show that the defendants had gone beyond the bounds of fair comment."

Accord: Shore Poster Advertising Corp. v. Richmond Post Advertising Co., Inc., et al., 104 N. Y. S. 2d 1009, 1016 (Sup. Ct. Richmond Co. 1951).

In sum, upon the law and upon the facts, the charge by the trial court was fair and correct. It was not misleading as to the facts, it did not misstate the law to petitioner's disadvantage. The jury was given the contentions of the parties on the various issues and found for respond-

ent. The petitioner was accorded a fair trial and his case submitted to the jury under adequate instructions.

Plaintiff's Attack Upon the Trial Court is Unwarranted

The petitioner's trial counsel made no objection to any of the so-called prejudicial comments of the trial court, and the Court of Appeals rejected the contention (42).

The rule is that where questions as to the propriety of the conduct of the trial court were not raised by counsel at the trial, the contention of impropriety will not be considered by the Appellate Court. *Albina Engine & Machine Works, Inc.* v. *Abel,* 305 F. 2d 77, 85 (10th Cir. 1962); *Southern Ry. Co.* v. *Miller,* 285 F. 2d 202, 206-207 (6th Cir. 1960); *Dowell, Inc.* v. *Jowers,* 182 F. 2d 576, 579 (5th Cir. 1950). The Court of Appeals did not apply this rule, as it well might have, but "after careful consideration" rejected petitioner's contention. There is nothing in the Record requiring this Court's consideration.

POINT III

THE COURT BELOW WAS CORRECT IN SUGGESTING THE POSSIBILITY OF APPLYING *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964) TO THIS CASE. IN ANY EVENT, NO QUESTION FOR REVIEW IS RAISED THEREBY.

In *dicta,* the Court below stated that had the case not been correctly decided in light of New York law, it might be necessary for the Court to consider whether the judgment should not have to be affirmed in the light of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). To this *dicta* petitioner objects.

Dicta presents nothing reviewable by this Court. *Stickel* v. *United States,* 1 L. Ed. 2d 30 (Harlan J.) *cert. den.* 352 U. S. 882 (1956). Moreover, the *dicta* is sound. In *New York Times Co.* v. *Sullivan,* this Court recognized at 270:

> "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open . . .".

Public debate on matters of vital public concern is the air of freedom. As plaintiff voluntarily entered the arena of public debate on the issue of nuclear weapons testing, a matter of the greatest public interest and concern, as the editorial attacked only plaintiff's public views and actions on these matters, as the editorial was fully supported by the facts as adduced at trial, and as there was no proof of actual malice, the Court was indeed correct in suggesting the application of the principles announced in *Sullivan*. Petitioner seeks to use the law of libel as a weapon to thwart criticism of his public views and acts. As Judge Learned Hand stated in *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S. D. N. Y. 1943), aff'd 326 U. S. 1 (1944):

> "[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES W. RODGERS,
Counsel for Respondent,
220 East 42nd Street
New York, N. Y. 10017

ANDREW L. HUGHES,
ANSON M. KELLER,
Of Counsel.

November 25, 1964